

BEFORE THE INVESTIGATIVE PANEL OF THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING JUDGE
HOWARD C. BERMAN, JQC NO.
00-211

Case No. SC 00-2491

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MEMORANDUM OF LAW IN OPPOSITION
TO THE MOTION TO COMPEL TESTIMONY OF ROXANNE RAMOS
AND IN SUPPORT OF ENTRY OF A PROTECTIVE ORDER

Roxanne Ramos provided deposition testimony in pending proceedings before the Florida Judicial Qualifications Commission regarding Judge Howard Berman on Tuesday, May 15, 2001. Ms. Ramos' attorney, Jack Scarola, was present during that deposition. During that deposition, upon advice of counsel, Ms. Ramos declined to answer questions regarding the following:

(1) Information Ms. Ramos provided to the Palm Beach County Sheriff's office concerning an incident with Mr. Frank Roy on October 11-12, 2000;

(2) A letter dated November 28, 2000, addressed "to the court" relating to Ms. Ramos' complaint regarding Frank Roy's behavior on October 11, 2000;

(3) Whether Ms. Ramos described herself as a creative writer able to embellish details to attorneys involved in "the October event";

(4) A civil file that was allegedly taken from her home by Mr. Frank Roy on October 11, or 12, 2000;

(5) Whether the police photographed her injuries from the October 11-12, 2000 incident involving Mr. Frank Roy;

(6) Whether Ms. Ramos discussed the State Attorney's office policy regarding "dropping charges" and whether she, in fact, requested that charges against Mr. Frank Roy "be dropped";

(7) Whether Frank Roy lived with Ms. Ramos after October, 2000.

Mr. Scarola objected to the above questions, explaining that such information was privileged pursuant to Ms. Ramos' Fifth Amendment rights under the United States Constitution. (Dep. of Ms. Ramos, p. 20-27). The Respondent argues that Ms. Ramos cannot invoke her Fifth Amendment right to avoid answering the above listed questions because they do not involve the possibility of criminal prosecution. Respondent contends that the above listed questions are relevant to her credibility in regard to her charges against Judge Howard Berman. The motion does not explain how these questions are relevant. The Respondent also argues that Ms. Ramos should be compelled to answer the questions because her statements to the Palm Beach County Sheriff's office on October 12, 2000, and the letter to the court on November 28, 2000 were not under oath, thus she cannot be criminally prosecuted. Ms. Ramos should not be compelled to answer the above listed questions pursuant to her Fifth Amendment right to be free from self-incrimination and pursuant to the attorney work-product privilege.

Mr. Scarola objected to questions regarding Ms. Ramos' current relationship with Mr. Frank Roy on the bases that such questions are not relevant to the pending matter and that such questions are designed to annoy, harass and embarrass Ms. Ramos. (Dep. of Ms. Ramos, p. 7-8). Mr. Scarola further stated that Ms. Ramos would not answer such questions pending an opportunity to obtain a protective order from the court. (Dep. of Ms. Ramos, p.8). Mr. Scarola also cited the above listed bases when he objected to questions regarding Ms. Ramos' statements to the Palm Beach County

Sheriff's office regarding an incident with Mr. Frank Roy that allegedly occurred on October 11-12, 2000. (Dep. of Ms. Ramos, p.13). Nevertheless, the question was repeated and Ms. Ramos did answer some questions regarding allegations against Mr. Frank Roy, under oath, in the year 2000; contrary to Respondent's allegation in paragraph 6 of his motion to compel. (Dep.of Ms. Ramos, p. 15, 17).

Mr. Scarola terminated the deposition when counsel for Respondent continued to ask questions that would violate Ms. Ramos Fifth Amendment rights, that were not relevant and that were designed to annoy, harass and embarrass Ms. Ramos. Rule 1.310(c), Florida Civil Procedure, provides that a party may object to deposition questions to preserve a privilege or to terminate the deposition and make an immediate motion to the court pursuant to subsection (d) of the rule. Under subsection (d), a deposition may be terminated so that the parties may go before the court for a ruling to determine if the examination was conducted in bad faith, or was unduly annoying, embarrassing or oppressive, or if the deponent was instructed not to answer to preserve a privilege. Fla.R.Civ.P.1.310(d).

Ms. Ramos' rights under the Fifth Amendment of the United States Constitution protects her from providing testimony that could be used against her in a criminal proceeding. This privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; it protects against any disclosures which the witness reasonably believes might incriminate him in future proceedings." Carson v. Jackson, 466 So.2d 1188, 1190 (Fla. 4th DCA 1985) (citing Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 322, 38 L.Ed.2d 274(1973); Kastigar v. United States, 406 U.S. 441, 444-45, 92 S.Ct. 1653, 1656-57, 32 L.Ed.2d 212(1972).

Mr. Scarola, on Ms. Ramos' behalf, invoked her Fifth Amendment right against self-incrimination, because the answers to those questions could lead to information that would constitute the crimes of giving false information to a law enforcement officer and/or resisting or obstructing a criminal investigation in violation of §§837.05, 817.49 and 843.02, Florida Statutes 2000. Contrary to Defendant's allegations, such a statement need not be made under oath. Sections 817.49 and 837.05 simply provide that it is a first-degree misdemeanor to knowingly provide false information to any law enforcement officer. §§817.49, 837.05, Fla. Stat. (2000) (emphasis added). Section 837.012 Fla. Stat. (2000), on the other hand, does provide that a statement made under oath in a non-official proceeding constitutes perjury.

In Cliburn v. State, a domestic violence victim was jailed after she admitted that she lied to the police. 710 So.2d 669 (Fla. 2 DCA 1998). In Fripp v. State, the court held that a correction of a previously provided statement did not preclude conviction for resisting arrest without violence because the correction was not made before any harm was done. 766 So2d. 252, 254 (Fla. 4 DCA 2000). Here, the Defendant alleges that Ms. Ramon' charges against Mr. Frank Roy were the cause of his arrest and that she subsequently drafted a letter recanting those allegations. According to Cliburn and Fripp, Ms. Ramon could be subjected to criminal prosecution if it could be established that Ms. Ramon knowingly provided false information concerning Mr. Roy.

Ms. Ramon should not be compelled to answer questions regarding conversations with attorneys in the "October matter" because such information is privileged. "[O]ral statements made by witnesses to an attorney in the course of the litigation process are absolutely privileged and nondisclosable under what has come to be known as work product protection." Horning-Keating v.

State, 777 So.d. 438, 443 (Fla. 5 DCA 2001) (citing Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). In order to overcome this privilege the Defendant must allege in the motion to compel the following: “(1) the need for this fact work product to prepare a party’s case; and (2) that, without undue hardship, the party is unable to obtain the substantial equivalent of this fact work product by other means.” Id. at 444. Defendant’s motion to compel this information should be denied because he has failed to allege in his motion any evidence that would support his need for this information and the resulting hardship if it were not discovered.

Ms. Ramon’s conversations with the state attorney’s office regarding Mr. Frank Roy are privileged and are not discoverable. Investigative interviews of witnesses by state prosecutors are work product and not subject to discovery. Eagan v. DeManio, 294 So.d. 639 (Fla. 1974). In Olson v. State, the court held that “[t]he oral and unrecorded statements of witnesses to a state attorney are privileged as work product and not subject to discovery.” 705 So.d. 687, 690 (Fla. 5 DCA 1988). This would then include: statements as to whether Ms. Ramon is a creative writer and can embellish details; whether Ms. Ramon inquired about “dropping the charges” against Mr. Frank Roy; and whether Ms. Ramon asked for the dismissal of the charges against Mr. Roy. Such statements are also privileged pursuant to Ms. Ramon’s Fifth Amendment rights as asserted by Mr. Scarola during the deposition. Such information could lead to criminal prosecution as previously discussed in this memorandum or could provide links in a chain of evidence to support criminal charges.

Ms. Ramon should not be compelled to testify about the letter to the court dated November 28, 2000, regarding the incident with Mr. Frank Roy because such information is privileged pursuant to

her Fifth Amendment rights. As previously stated, testimony regarding this letter could reasonably lead to criminal prosecution.

Ms. Ramon should not be compelled to testify about any contact she has had with Mr. Roy as the public record reflects the entry and service on Ms. Ramon of a “no contact order” relating to Ms. Ramon and Mr. Roy, the violation of which could subject Ms. Ramon to criminal contempt.

Defendant cites Lande Verde v. State, for the proposition that Ms. Ramon must be compelled to answer the aforementioned questions because they do not relate to any hazard of incrimination. 769 So.d. 457, 461 (Fla.4 DCA 2000). In Lande Verde, the court was reconciling a criminal defendant’s right to compel testimony with a witness’ right to be free from self-incrimination. Id. The court held that a criminal defendant’s Sixth Amendment right to compel testimony yields to another’s Fifth Amendment rights. Id. In light of that, the assertion of the Fifth Amendment privilege must be based on something other than the person’s imagination. Lande Verde, 769 So.d. at 461. The court ultimately concluded that the witness’ reasoning for invoking his Fifth Amendment rights was “real and substantial” since he faced a harsher sentence if his probation was violated. Id. At 464.

In St. George v. State, the court held that “it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” 564 So.d. 152 (Fla. 5 DCA 1990); see also Jenkins v. Wessel, 780 So.d. 1006 (Fla. 4 DCA 2001). In St. George, the court considered whether there was a reasonable basis for invoking the privilege and whether that was done in good faith. 564 So.d. at 155. Similarly, Ms. Ramon could reasonably be criminally prosecuted based upon her answers to questions that she would not answer. Thus, the court

should conclude that her assertion of her Fifth Amendment right was real and substantial and not based on imaginary hazards.

In conclusion, the Respondent's motion to compel Ms. Ramon to answer the questions cited in Respondent's motion would violate her Fifth Amendment rights under the United States Constitution. Respondent's motion fails to address the necessary requirements to justify compelling such testimony. Ms. Ramon reasonably and in good faith asserted her Fifth Amendment right against self-incrimination to protect herself from criminal prosecution.

Plaintiff respectfully requests entry of an order denying Respondent's motion to compel Ms. Ramon testimony based upon the aforementioned grounds and granting Ms. Ramos protection from any further inquiry into matters concerning her relationship or contact with Frank Roy.

I HEREBY CERTIFY that a true copy was furnished on this _____ day of June, 2001 to Sidney A. Stubbs, Esq., Jones, Foster, Johnston & Stubbs, P.A., 505 S. Flagler Drive, West Palm Beach, FL 33401, Thomas C. MacDonald, Jr., Esq., 100 North Tampa Street, Suite 2100, Tampa, FL 33602, Brooke S. Kennerly, Executive Director, 400 S. Monroe, The Historic Capitol, Room 102, Tallahassee, F 32399, John R. Beranek, Esq., P.O. Box 391, Tallahassee, FL 32302-0391, Judy S. Hoyer, Esq., James, Hoyer, Newcomer & Smiljanich, P.A., 4830 W. Kennedy Boulevard, Suite 147, Tampa, FL 33602, Hon. James Jorgenson, Chair, Hearing Panel, Florida Judicial Qualifications Commission, Room 102, The Historic Capitol, Tallahassee, FL 32399-6000, Scott N. Richardson, Esq., Atterbury, Goldberger & Richardson, 250 Australian Avenue South, Suite 1400, West Palm Beach, FL 33401-5015, Bettye J. King, Esq., 625 N. Flagler Drive, Suite 501, West Palm Beach, FL 33481.

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